United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-1474

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

DOCKET NO. 76-1516

DONALD QUEALY,

Defendant-Appellant.

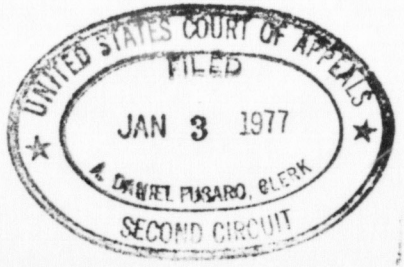
APPELLANT'S BRIEF & APPENDIX

I. BACKGROUND OF THE CASE

An information has been rendered against the Defendant for his alleged failure to comply with the requirements of Title 26, U.S.C. Sections 4401, 4411, 4421(1) and (2) and 6011(a), in violation of Title 26, U.S.C. Section 7262, which imposes an annual tax of $500 on any person engaged in wagering activities.

The Defendant moved the United States District Court to dismiss the information on the ground that the statutory scheme, as aforesaid, is in derogation of the Defendant's privilege against self-incrimination as guarantees by the Fifth Amendment to the Constitution of the United States.

On September 21, 1976, the Court, Clarie, Chief Judge, denied the motion without writing an opinion. Therefore, on



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September 22, 1976, the Defendant entered a plea of nolo contendere to the information, reserving his right to appeal, and was fined $1,000. On September 30, 1976, a notice of appeal was filed in this matter. This brief is in support of Appellant's appeal.

II. ISSUE BEFORE THE COURT ON APPEAL

The Court of Appeals must decide whether the statutory scheme of Chapter 35 of the Internal Revenue Code (including 26 U.S.C. § 4401, 4411, 4412, 4901, 6011(a) and 7262) violates the Fifth Amendment privilege against self-incrimination and is therefore unenforceable.

III. THE DEFENDANT'S POSITION

A. THE SUPREME COURT HAS HELD THAT WAGERING TAX STATUTES VIOLATE THE FIFT AMENDMENT

In 1968, the Supreme Court held that the wagering tax statutes, as then written, violated the Fifth Amendment privilege against self-incrimination because the information required to be submitted by a taxpayer in compliance with the statutes was inherently incriminatory, and its submission subjected a taxpayer to substantial risks that the information would be used against him in a subsequent criminal prosecution. Marchetti vs. United States, 390 U.S. 39; Grosso v. United States, 390 U.S. 62, The Supreme Court stated that wagering, on both federal and state levels, is "an area permeated with

criminal statutes" and that those individuals engaged in wagering are a group "inherently suspect of criminal activities". Marchetti v. United States, supra, at 47. Grosso v. United States, supra, at 910.

The Court, in those cases, enunciated a standard to test whether or not compliance with a statutory scheme impermissibly forces certain persons to incriminate themselves. The convictions in both cases were reversed because by complying with the wagering tax statutes the defendants were confronted with substantial and real, as opposed to merely imaginary or trifling, hazards of incrimination. Marchetti v. United States, supra, at 897-8, 901; Grosso v. United States, supra, at 911.

B. THE STATUTORY SCHEME, AS AMENDED, IS UNCONSTITUTIONAL AS IT STILL SUBJECTS CERTAIN TAXPAYERS TO REAL AND SUBSTANTIAL HAZARDS OF SELF-INCRIMINATION

1. "REAL AND APPRECIABLE HAZARDS" DEFINED

The case of Priebe v. World Ventures, Inc., 407 FS 1244, at 1245 (C.D. Cal. 1976) recently considered further defining the real and appreciable risk standard enunciated in Marchetti and Grosso.

The question of what constitutes a "real and appreciable risk has been interpreted in a fashion designed to fully protect individual rights. McCormick in his treatise on evidence states that 'the now prevailing general judicial attitude (is) that

almost any conceivable danger is real and appreciable' § 123, at 263 (2d Ed. E. Cleary, 1972). Wright & Mather observe that the privilege is available "even if the risk of criminal prosecution is remote", 8 Federal Practice and Procedures § 2018 at 141 (1970). See also Hoffman v. U.S., 341 U.S. 479, 488 (1951): "In this setting, it was not perfectly clear that the answer(s) cannot possibly have such tendency to incriminate." See e.g., Grey v. Abdulla, 58 F.R.D. 1, 2 (N.D. Ohio 1973); de Antonio v. Solomon, 42 F.R.D. 320, 323 (D. Mass. 1967). Priebe contrasts "real and appreciable" with "imaginary and insubstantial", Minor v. U.S., 396 U.S. at 98; without the possibility of a "tendency" to incriminate , Hoffman v. U.S., supra, at 341 U.S. and 488; with trifling Marchetti v. U. S., 390 U.S. 39, 53, or with purely fantastic de Antonio v. Solomon, 42 F.R.D. at 323.

2. PAYMENT OF TAXES AND FILING OF FORMS DO NOT EXEMPT PERSONS FROM STATE OR FEDERAL CRIMINAL PROSECUTIONS

Taxpayers currently involved in the many facets of wagering activity are subjected to a myriad of substantial criminal penalties pursuant to both federal and state laws upon an admission of wagering. E.g., see 18 U.S.C. 1953, 1301-1304, 1084, 1952, 1955. See Marchetti v. U.S., supra, 390 U.S. 44, for a comprehensive list of federal and state anti-gambling statutes. The Connecticut statutes have since been amended, but gambling is still extensively punished. See C.G.S.

Sections 53-278a to 53-278g.

The wagering taxes are imposed primarily on those engaged in accepting illegal wagers. Therefore, filing the returns required to be submitted with payment of the taxes amounts to a compelled confession of involvement in activities which are criminally punishable under federal and state laws.

Payment of such taxes grants no immunity from further prosecution for illegal gambling: "The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity." 26 U.S.C. Sec. 4422.

Section 4401 of the Internal Revenue Code imposes on those engaged in the business of accepting wagers a two per cent excise tax on the gross amount of all wagers they accept. Each person liable for Sec. 4401 tax must file a monthly return (Form 730) with his tax payment (Treas. Reg. Secs. 44.6011 (a) - 1(a)). Payment of the exise tax is not accepted by the I.R.S. unless it is accompanied by the return. See Grosso v. U.S., supra, 390 U.S. at 65. In addition, the taxpayer must keep daily records showing the gross amount of all wagers he has received (Sec. 4403; Treas. Reg. Sections 44.4403-1; 44.6001-1).

Section 4411 of the Internal Revenue Code, which applies primarily to persons accepting illegal wagers, imposes an

annual occupational tax of $500 on those who are liable for the excise tax under Sec. 4401 and on those who accept wagers on behalf of someone liable for the excise tax. In order to pay the tax, a taxpayer must first register with the I.R.S. in accordance with Sec. 4412 and file Form 11-C (Sec. 4412 and Treas. Reg. Sections 44.4901-1(a) and 44.6011(a)-1(b)). Payment of the tax must be evidenced by a special tax stamps which is issued to the taxpayer upon receipt by the District Director of a return on Form 11-C, the occupational tax return and registration form, together with remittance of the tax. The District Director is prohibited from issuing a receipt instead of the special tax stamp. On Form 11-C, the taxpayer must state his true name and any alias; his home and business address, and whether or not he is or will be receiving wagers on his own account or on behalf of someone else.

As the Court noted in Marchetti, the I.R.S. will not accept payment of the tax unless it is submitted with the registration form. "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure." Marchetti v. U.S., supra, 390 U.S. at 42-43.

The provisions described above are essentially the same as they were when the Supreme Court held their enforcement to be unconstitutional. Since Marchetti and Grosso only minimal

changes in the amount of the taxes imposed have been enacted. The excise tax has been decreased from 10% to 2% and the occupational tax has been increased from $50 to $500. The statutory obligations to publicize payments of wagering taxes in effect at the time of Marchetti and Grosso, were removed later in 1968 (Sec. 6107, requiring disclosure of information by the I.R.S., was repealed; Sec. 6806(c), requiring that a taxpayer post his tax stamp, was amended to exclude wagering tax stamps).

3. TITLE 26. U.S.S. SECTION 4424 FAILS TO PLACE SUFFICIENT RESTRICTIONS UPON THE DISCLOSURE AND USE OF INFORMATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

a. Disclosure Inadequacies of 26 U.S.C. 4424

In a modest attempt to rectify the constitutional infirmities of the statutory scheme found in Marchetti and Grosso, Congress enacted 26 U.S.C. 4424 which purportedly restricts the disclosure and use of wagering information received from taxpayers. However, this section does little to alleviate the possibilities of widespread dissemination of wagering information, and Section 4424 continues in numerous ways to subject taxpayers to substantial and real hazards of self-incrimination.

U.S.C. Section 4424(a) purports to prevent Treasury Department officials and employees from divulging "to any person" information on wagering tax returns, payments or registrations. The statutory scheme in 26 U.S.C. 7701, defines "person" as follows:

> The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

Since "person", under the foregoing definition does not include state governments or the Federal Government or any agencies thereof, 26 U.S.C. 4424(a) provides inadequate protection to the defendant. Within the literal meaning of this statute, Treasury Department officials and employees could divulge wagering tax information to prosecutors or other enforcement officials in the State of Connecticut or to other Federal agencies. There is nothing to prevent such disclosure. Surely the defendant may reasonably expect that information obtained by any wagering tax payment and registration will ultimately be offered to federal and state prosecutorial agencies. He could not expect anything less, and even if Treasury employees elected to withhold such disclosure, it is fundamental that taxpayers are entitled to Fifth Amendment protections, rather than being forced to rely on prosecutorial forebearance.

The limitation of the definition of "person" in Section

7701 extends to the entire Title 26 statutory scheme including 26 U.S.C. 4424(b)(1), which permits disclosure of documents and information in connection with the administration of civil or criminal enforcement of Title 26. Clearly, states and Federal agencies are exempted. 26 U.S.C. 7701. In addition, members of the Treasury Department are required to furnish, upon request, wagering tax returns, payments and registrations to certain congressional committees sitting in executive session (the House Ways and Means Committee; the Senate Finance Committee, the Joint Committee on Internal Revenue Taxation and any specially authorized select committee). These committees may submit information obtained from the documents furnished them to the Senate or the House (Sections 4424(d); 6103(d)). See also 2 U.S.C. 72a(d).

Another likely situation in which state and federal prosecutors are likely to receive tax information occurs when a taxpayer files an inadequate wagering tax return necessitating a public trial where no documents may be disclosed in court pursuant to Title 26, U.S.C. Section 4424(b)(1). Although United States officers and employees are prohibited from divulging any information so disclosed, state officials and employees are not prohibited in any such manner.

This swiss cheese disclosure provision requires the

widespread dissemination of incriminating information merely upon request. States and other agencies may acquire such information directly from the Treasury Department or indirectly from disclosures by Congress or at public trials. The protection guaranteed by the Fifth Amendment does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Maness v. Meyers, 419 U.S. 449, 461. See also Marchetti v. U.S., supra, 390 U.S. at 48. Whether or not prosecutors have exercised discretion in forbearing from prosecutions, the loopholes in § 4424 and the filing requirements of other sections clearly are not the equivalent of Fifth Amendment protection.

b. Failure to Provide Use Immunity

Under the foregoing circumstances, the statute must provide complete immunity for the defendant against the use of documents or information in any criminal proceeding.

The statutory protection provided must be "so broad as to have the same extent in scope and effect as the privilege itself," Marchetti v. U.S., supra, 390 U.S. at 58 quoting Counselman v. Hitchcock, 142 U.S. 547, 585, 585, 35. L. Ed.1110, 1122 (1892). Albertson v. Subversive Activities Control Board, 382

U.S. 70, 80, 172. Only use immunity protects a taxpayer sufficiently because "(i)t prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness" (emphasis added). Mackey v. U.S., 401 U.S. 667, 703-704, 28 L. Ed.2d 404 427 (1971), Brennan concurring; Reina v. U.S., 364 U.S. 507 5 L.Ed. 2d 249 (1970); Adams v. Maryland, 347 U.S. 179, 98 L.Ed 608 (1954).

In Manness v. Meyers, 419 U.S. 449, 42 L.Ed 2d 574 (1975), the court, ruling on a pretrial maneuver to compel the disclosure of allegedly obscene material, reversed a contempt citation because of the lack of use immunity.

> On this record, with no state statute or rule guaranteeing a privilege or assuring that at a later criminal prosecution the compelled magazines would be inadmissible, it appears that there was no avenue other than assertion of the privilege, with the risk of contempt, that would have provided assurance of appellate review in advance of surrendering the magazines.
>
> Id., 419 U.S. at 470.

The information required under the wagering tax laws is by its nature incriminatory. Unlike the allegedly obscene magazine in Maness, mere possession of wagering information is, in

itself, a confession of being involved in illegal gambling. Under Marchetti and Grosso, if the protection granted by Sec. 4424 is not equivalent in scope to the Fifth Amendment itself, a defendant may assert his privilege, and avoid conviction, simply by failing to register and to file the return (without which the tax payment will not be accepted by the I.R.S.). See also Haynes v. U.S., 390 U.S. 85, 100.

However, even if Sec. 4424's prohibition against disclosure were comprehensive, the Supreme Court has held that it would not be sufficient to overcome the Fifth Amendment privilege against self-incrimination. In Haynes v. U.S., supra, the court overturned a conviction for possession of unregistered firearms under the National Firearms Act, which required a transferee of certain weapons to register with the I.R.S. All the weapons for which registration was required were illegal under various state and federal laws, and held that compulsory registration violated the privilege against self-incrimination.

Three years later, in U.S. v. Freed, supra, the court upheld enforcement of the amended firearms registration law, which provided for complete use immunity, and required registration of all firearms by the manufacturer rather than the buyer.

> The revised statute explicitly states that no information or evidence provided in compliance with the registration or transfer provisions of the Act

> can be used, directly or indirectly, as evidence against the registrant or applicant 'in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.' The scope of the privilege extends, of course, to the hazards of prosecution under the state law for the same or similar offenses.
>
> U.S. v. Freed, supra, 401 U.S. at 604.

In comparison to the court's holding in Freed, Congress' amendments to the wagering tax statutes are pale and inadequate. First, unlike Freed, the statutes are imposed on a group inherently suspect of criminal activities. Second, there are many avenues of disclosure, and third, the wagering tax statutes fail to provide use immunity. Because compliance with the statutes inevitably means supplying inherently incriminatory information to governmental authorities, the wagering statutes continue to violate the privilege against self-incrimination. The failure to provide the protection afforded in Freed magnifies the risks of self-incrimination beyong "trifling or imaginary" degrees U.S. v. Freed, supra, at 606.

Because Sec. 4424 authorizes disclosures, the taxpayer, in filing a return and paying the tax, is by no means "left in the same position as if he had not given" the information, as the court determined was the case in Freed (401 U.S. at 606).

Confidentiality of the returns and of payments of the tax is not assured by Sec. 4424. Therefore, punishment of one who fails to file a return and pay the occupational tax violates the Fifth Amendment guarantee against self-incrimination.

IV CONCLUSION

The appellant respectfully requests, for the reasons stated above, that his conviction, be reversed.

APPELLANT

BY _____
Mark S. Steier
His Attorney
Steier & Nerenberg
10 North Main Street
West Hartford, Ct. 06107

CERTIFICATION

This is to certify that eight copies of the foregoing and of the Appendix hereinafter have been sent this 15th day of December, 1976, to the Clerk's Office, United States Courthouse, United States Court of Appeals for the Second Circuit, Foley Square, New York, New York 10007, and this is to further certify that one copy of the foregoing and of the Appendix hereinafter has been sent this 15th day of December, 1976, to Paul E. Coffey, Esquire, Special Attorney, United States District Court, 450 Main Street, Hartford, Connecticut 06103.

_____
Mark S. Steier

APPENDIX TO APPELANT'S BRIEF

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

V. : CRIMINAL NO. H-76-22

DON QUEALY :

INFORMATION

The United States Attorney charges:

COUNT ONE

That during the months of May, June, July, August, September, October, November, and December, 1975 the defendant, DON QUEALY, whose residence was in the District of Connecticut, did at a place of business in Hartford County, Connecticut, in the District of Connecticut, engage in the business of receiving and accepting wagers, as defined in Section 4421(1) and (2) of Title 26, United States Code, whereby he became liable for the special occupational tax imposed by Section 4411, Title 26, United States Code; that

prior to engaging in said business he was required by Section 4401 of Title 26, United States Code, and applicable regulations, to pay the special occupational tax imposed by Section 4411 of Title 26, United States Code, to the District Director of Internal Revenue, Hartford, Connecticut; and that prior to engaging in said business he failed to pay said special occupational tax to the District Director, or to any other proper officer of the United States.

In violation of Section 7262, Internal Revenue Code; 26 United States Code, 7262.

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

BY: PAUL E. COFFEY
Special Attorney
U.S. Department of Justice

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
VS.	:	CRIMINAL NO. H-76-70
DONALD QUEALY	:	

MOTION TO DISMISS THE INDICTMENT

The defendant in the above-entitled action respectfully moves the Court for an Order dismissing the information pending against him and as reasons therefore assigns the following:

1. The defendant may not be criminally punished for failure to comply with the requirements of Title 26, United States Code Sections 4401, 4411, 4421(1) and 7262, as charged in the information, since such compliance would violate the defendant's constitutional privilege against self-incrimination, in derogation of the Fifth Amendment to the Constitution of the United States.

2. As drawn, the statutory scheme encompassing the provisions of Title 26, United States Code Sections 4401, 4411, 4421(1) and 7262, which the defendant is accused of failing to comply with, is an unconstitutional dimunition and is in derogation of the defendant's privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States.

3. The defendant also moves to incorporate by reference the brief in support of defendant's motion to dismiss heretofore filed in the case of United States of America v. Michael Chiarizio,

FELONY Fel

06 | 205 | 2 (Disp. Sentence: District / Office)

QUEALY, DON (LAST, FIRST, MIDDLE)

JUVENILE

Case Filed Mo. / Day: 5 / 14

No. of Days: 0

TEC 76 70 1

U.S. MAG. CASE NO.

U.S. TITLE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS →
26:7262	failure to pay special occupational tax to IRS prior to engaging in business of receiving & accepting wagers	1

SUPERSEDING COUNTS

BAIL • RELEASE

$ (000) Date

Bail Not Made

Status Changed (See Docket)

Conditions: 10% Deposit; Surety Bond; Collateral; 3rd Pty. Cust.; Other

II. KEY DATES & INTERVALS

ARREST or: U.S. Custody Began; Summons Served; First Appearance

INDICTMENT: High Risk Date; Information 5/14/76; Indict. Waived; In Charging District; Superseding Indict/Info

ARRAIGNMENT: 1st Plea 5/24/76; Final Plea 9/21/76; Trial Set For; [X] NG [ ] G [ ] NOL; [ ] G. Plea W/Drawn; [ ] NG [ ] G [X] NOL

TRIAL: Voir Dire; Trial Began; Trial Ended

SENTENCE: Disposition of Charges 9/21/76; 9/21/76; [X] Convicted; [ ] Acquitted; [ ] Dismissed; [X] On All Charges; [ ] On Lesser * Offense(s); [ ] WOP; [ ] WP; [ ] On Government's Motion

MAGISTRATE

	DATE	INITIAL NO.
Search Warrant: Issued / Return		
Summons: Issued / Served		
Arrest Warrant Issued		
COMPLAINT ▶		
OFFENSE (in Complaint)		

INITIAL APPEARANCE DATE ▶ (INITIAL NO.)

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶

[ ] WAIVED [ ] NOT WAIVED

[ ] INTERVENING INDICTMENT

Tape Number

OUTCOME: [ ] DISMISSED; [ ] HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT; [ ] HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Peter C. Dorsey, US Atty.
Paul E. Coffey, Sp. Atty.

ATTORNEYS [ ] Def. [X] CJA [ ] Ret'd [ ] Waived [ ] Self [ ] None / Other [ ] PD [ ] CD

Mark S. Steier
772 Farmington Ave.
W. Hartford, Conn. 06119

* Show last names and suffix numbers of other defendants on same indictment/information.

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (3) (8) (3)
1976		
5/14	Information, filed.	
5/17	Summons issued and handed US Marshal.	
5/17	Motion to Remand to U.S. Magistrate for Trial Under Rule 9(d), F.R.Cr.P., filed.	
5/24	Financial Affidavit CJA 23 given Deft. PLEA of not guilty entered. Requests Atty. (Clarie, J.)	
5/25	Marshal's executed return, filed. (Summons)	
6/3	CJA 23, Financial Affidavit, filed.	
6/3	CJA 20 executed (Templeton, D.C.) appointing Mark S. Steier to represent defendant.	
6/11	Appearance of Mark Steier, filed.	
6/11	Request of U.S. to Withdraw Motion to Remand, filed.	
6/24	Notice of Readiness, filed by Govt.	
7/9	Court Reporter's notes and Sound Recordings of Proceedings held on May 24, 1976, filed in Hfd. (Sperber, R.)	
9/20	JURY ASSG. LIST - To go off calendar until pending motions have been decided. (Clarie, J.)	

Continued

1976	
9/21	Motion to Dismiss, filed. .Endorsement entered on Motion to Dismiss, "9/21/76. Motion denied." (Clarie, J.) M.9-22-76. Copies mailed to counsel of record. CHANGE OF PLEA to nolo contendere entered to one count. Court makes a finding of guilty. Counsel reserves the right to appeal. Pre-sentence report waived. DISPOSITION - $1000.00 committed fine - stayed 10 days. (Clarie, J.)
9/22	Judgment Order, filed. (Clarie, J.) M.9-23-76.
9/30	Notice of Appeal, filed. Copies sent to counsel of record.
9/30	Certified copies of docket and Notice of Appeal mailed to USCA.
10/8	Acknowledgment from USCA on documents mailed on September 30, 1976, filed.

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER